STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SZYMANSKI,

Plaintiff-Appellant,

v

LEO JOSEPH MILLER and LEO J. MILLER FUNERAL HOME,

Defendants-Appellees.

UNPUBLISHED
April 2, 1999

No. 199542
Wayne Circuit Court
LC No. 96-605685 NI

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff-appellant Michael Szymanski appeals as of right a trial court order granting defendants' motion for summary disposition under MCR 2.116(C)(8) and (10), on the basis of the "fireman's rule." We affirm.

I. Basic Facts And Procedural History

In late July of 1995, Szymanski, while in the course of his duties as a Hamtramck Police Officer, was injured when the vehicle in which he was riding as a passenger collided with another vehicle operated by defendant appellee Leo Miller ("Miller"). At the time of the accident, Szymanski and his partner, Joseph Bobby, who was driving, were en route on an "emergency run," having been dispatched to assist another scout car. They were riding in a marked patrol car and the overhead lights were activated. According to the police report, Szymanski's scout car approached Miller's car from behind, then drove left of center to go around Miller's car when, at the same time, Miller's car started making a left turn, resulting in a collision. Szymanski's scout car then careened into a fire hydrant and bounced off another parked vehicle. As a result of the accident, Szymanski sustained a torn rotator cuff injury, for which he received surgery, and other injuries.

Szymanski filed suit in mid-February of 1996, against Miller and the "John J. Skupny Funeral Home." The complaint alleged both "careless" and "negligent" behavior and "willful and wanton negligence and also gross negligence in the operation of the motor vehicle." Miller answered the complaint, alleging ten affirmative defenses, none of which made reference to Szymanski's status as a

police officer. Szymanski later dismissed Skupny and was granted leave to add defendant-appellee Leo J. Miller Funeral Home as a defendant. In early August of 1996, defendants filed a motion for leave to amend their affirmative defenses in order to allege the "fireman's rule" and a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), alleging that "plaintiff's claim is barred by the Fireman's Rule."

The trial court heard the motions in early October of 1996. Szymanski's position was that the fireman's rule "would be something similar to governmental immunity which . . . must be raised [as an] affirmative defense.[1] The trial court granted both motions:

> The Court is going to allow the amended complaint. I don't think it was unreasonable delay.
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> I don't think it was not filed at an earlier time for any inappropriate reason. Having allowed the amendment, the Court is also going to find that the rule does apply to the scenario that has been put forth and will grant the motion.

II. Standard Of Review

This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Smith v Kowalski*, 223 Mich App 610, 612; 567 NW2d 463 (1997). "This Court reviews the trial court's decision on a motion brought under this rule de novo to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id*. at 612-613. When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must review the documentary evidence and determine whether a genuine issue of material fact exists. *Paul*, *supra*. Summary disposition under MCR 2.116(C)(10) is appropriate only if a trial court is satisfied, based on the evidence produced, that it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome. *Id*. Where, as here, the ground relied on by the trial court in granting summary disposition is unclear and documentary evidence was offered in support of the summary disposition motion, we will address the motion as being granted under MCR 2.116(C)(10). See *Royce v Citizens Ins Co*, 219 Mich App 537, 540-541; 557 NW2d 144 (1996). Defendants' motion for summary disposition was based upon the applicability of the fireman's rule. Szymanski opposed the motion. The trial court considered and ruled on the question. Accordingly, the issue is preserved.

III. The Fireman's Rule

A. Overview

The "fireman's rule" originated as an exception to the general principles of landowner liability. "[I]ts most basic formulation is that a fire fighter or police officer may not recover damages from a private party for negligence in the creation of the reason for the safety officer's presence." *Kreski v*

Modern Wholesale Electric Supply Co, 429 Mich 347, 358; 415 NW2d 178 (1987). The rule "applies equally to police officers as well as firemen." *Id*. at 358, n 6.

Michigan adopted the fireman's rule in *Kreski, supra,* in which the Michigan Supreme Court stated:

> It is beyond peradventure that the maintenance of organized society requires the presence and protection of fire fighters and police officers. The fact is that situations requiring their presence are as inevitable as anything in life can be. It is apparent that these officers are employed for the benefit of society in general, and for people involved in circumstances requiring their presence in particular.
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> The very nature of police work and fire fighting is to confront danger. The purpose of these professions is to protect the public. It is this relationship between police officers, fire fighters, and society which distinguishes safety officers from other employees. Thus, safety officers are not "second-class citizens," but, rather, are "different" [from] other employees. [*Id.* at 366-368.]

The Court added, however, that it was "not attempting to delineate the precise parameters of the rule in this opinion." *Id* at 370. Rather, the Court proposed to "flexibly address the different fact patterns as they are presented." *Id*. at 371.

> The scope of the rule adopted today includes negligence in causing the incident requiring a safety officer's presence and those risks inherent in fulfilling the police or fire fighting duties. Of course, this does not include all risks encountered by the safety officer. The fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being. *The fireman's rule only insulates a defendant from liability for injuries arising out of the inherent dangers of the profession.* [*Id* at 372-373; emphasis supplied.]

The Michigan Supreme Court examined the application of *Kreski* in *Woods v Warren*, 439 Mich 186; 482 NW2d 696 (1992). There, the plaintiff was a police officer injured when his police car skidded on an icy street during a high-speed chase of a stolen vehicle. In discussing the applicability of the fireman's rule in such a case, the Court stated:

> Sergeant Woods' crash occurred while he was performing a classic police function. After receiving a radio report of a stolen car, he located it, informed the dispatcher, and pursued it. Sergeant Woods . . . was actively engaged in one of a police officer's most common duties. . . . Driving at high speeds on potentially icy roads obviously increases the risk of an accident such as Sergeant Woods'. This injury clearly stems from the performance of a fundamental police function. In such circumstances, the fireman's rule "foundational policy rationale" applies, and plaintiff's suit must share

> the same fate as those in *Kreski* and *Reetz* [a case consolidated with *Kreski*], i.e., dismissal. [*Id.* at 192.]

The Court in *Woods* explained that "[t]he kind of duty, not the kind of injury, provides the starting point for analysis." *Id* at 194. The *Woods* Court reaffirmed its holding in *Kreski* that "'[t]he scope of the [fireman's] rule . . . includes negligence in causing the incident requiring a safety officer's presence *and* those risks inherent in fulfilling the police or fire fighting duties.'" *Id.* at 195, quoting *Kreski, supra* at 372 (emphasis supplied in *Woods*).

In *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83; 520 NW2d 633 (1994), this Court held that a police officer's negligence action, stemming from a traffic accident, was barred by the fireman's rule where the officer was assigned to traffic enforcement and was on duty in his patrol area at the time of the accident. This Court stated:

> [T]he risk of a traffic accident is inherent in fulfilling the duties of a police officer, such as plaintiff, assigned to traffic enforcement. Therefore, the circumstances of this case indicate that plaintiff's injury stemmed directly from his duty as a traffic enforcement officer. . . . Plaintiff's claim is barred by the fireman's rule. [*Id.* at 87.]

However, in *Atkinson v Detroit*, 222 Mich App 7; 564 NW2d 473 (1997), a case in which a police officer was injured in a motor scooter accident while "on break," *id.* at 9, this Court held that the fireman's rule was not applicable to bar the plaintiff's negligence action and stated that the case was factually distinguishable from both *Woods, supra*, and *Stehlik, supra*, explaining:

> Unlike the officer in *Woods, supra* at 192, Atkinson's status as a police officer did not increase his risk of injury, and unlike the officer in *Stehlik, supra* at 86-87, Atkinson was not engaged in his specific police assignment . . . at the time of his injury. [*Atkinson, supra* at 11.]

The Michigan Supreme Court examined the applicability of the fireman's rule in a situation where the injury stemmed from the negligence of an independent third-party, unconnected to the situation that brought the officer's presence to the scene in *Gibbons v Caraway*, 455 Mich 314; 565 NW2d 663 (1997). In that case, a police officer was struck by an automobile while directing traffic at the scene of an automobile accident. In four separate opinions, a majority of the Supreme Court declined to apply the fireman's rule. In *Harris-Fields v Syze (On Rehearing)*, 229 Mich App 195, 197-199; 581 NW2d 737 (1998), lv pending, this Court summarized the various opinions in *Gibbons*, and their effect, as follows:

> In an opinion joined by Chief Justice Mallett and Justice Kelly, Justice Cavanagh concluded that when a police officer responds to an accident scene and is subsequently injured by a third party's "wanton, reckless, careless, negligent, or grossly negligent" conduct, the fireman's rule may not serve as a bar to a tort action by the officer against the third party. 455 Mich 326. Because there was a factual dispute concerning the reason why Caraway swerved, Justice Cavanagh declined to apply the fireman's rule. Justice Boyle, joined by Justice Brickley, concurred, but stated that "the fireman's rule

> does not bar a claim for damages for injuries caused by the subsequent wrongdoing of a third party uninvolved with the original act, where the wrongdoing resulted from wanton, reckless, or grossly negligent behavior." 455 Mich 329-330. Justice Boyle's opinion specifically stated, that "[i]n regard to carelessness or ordinary negligence, however, the fireman's rule bars the claim." *Id.*, p 330. Justice Weaver concurred in the result, but for the reason that application of the fireman's rule should be limited to premises liability cases. 455 Mich 334. Finally, Justice Riley stated that the fireman's rule should apply to bar the officer's tort action because his injury stemmed directly from his police function. 455 Mich 339.
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> Reading Justice Cavanagh's plurality opinion together with Justice Boyle's concurrence, it is apparent that a majority of our Supreme Court agrees that the fireman's rule may not apply, and a tort action may be maintained, when a police officer has responded to a call or an offense and is injured as a result of the subsequent wanton, reckless, or grossly negligent conduct of an independent third party unconnected to the situation that brought the officer to the scene. A majority does *not* agree that where, as in this case, the plaintiff police officer's representative alleged only carelessness or ordinary negligence on the part of a third party unconnected to the event to which the officer was responding, the bar of the fireman's rule can be avoided.

This Court in *Harris-Fields* went on to hold that "the limited exception to the fireman's rule recognized by a majority of the justices in *Gibbons*, *supra*, does not apply" in a case in which a police officer is injured by a third-party's conduct, unless the conduct rises to a level of "wanton, reckless, or grossly negligent" conduct. *Harris-Fields*, *supra* at 199. Although the police officer in *Harris-Fields* was fatally injured by a third-party, unconnected to the situation that brought the officer to the scene, this Court upheld dismissal of the plaintiff's action because the plaintiff did not allege, nor did the facts support, "wanton, reckless, or grossly negligent" conduct on the part of the defendant. *Id.* at 198-199.

Thus, under *Gibbons*, as construed by *Harris-Fields*, the limited exception to the fireman's rule, applicable where an officer is injured by the negligent conduct of a third-party unconnected to the situation that brought the officer to the scene of his duties, applies only when the defendant's alleged wrongdoing results from "wanton, reckless, or grossly negligent" behavior. We note, however, that in the recent case of *Roberts v Vaughn*, 459 Mich 282, 286, n 4; ___ NW2d ___ (1998), the Michigan Supreme Court stated:

> In *Gibbons*, a five-justice majority, in two separate opinions, agreed that the firefighter's rule does not bar a claim for damages for injuries caused by the *subsequent* wrongdoing of a third party unconnected to the situation that brought the officer to the scene, where the wrongdoing resulted from wanton, reckless, or grossly negligent behavior. See *id.* at 325-326 (Cavanagh, J.), 329-330 (Boyle, J.). In *Mariin v Fleur, Inc*, a case consolidated and decided with *Gibbons*, an off-duty police officer was injured when an individual in a bar attacked the officer after recognizing the officer as the one who had arrested him several years previously and attacked him [sic]. We held that the firefighter's rule did not bar the officer's claim because the connection between

> the injury was too attenuated from the exercise of the officer's police function. [Emphasis in the original.]

The opinion in *Roberts* was, unlike the opinion in *Gibbons*, unanimous. Under the interpretation in footnote 4 of *Roberts*, therefore, it is certainly arguable that the exception to the fireman's rule for wanton, reckless or grossly negligent behavior is only applicable when such wrongdoing was *subsequent* and unconnected to the situation that brought the officer to the scene.

B. Application Of The Fireman's Rule

Here, Szymanski was injured in the course of performing a classic police function, i.e., he was actively engaged in an emergency run, having been dispatched to assist another officer. Moreover, we reject the claim that this case is similar to *Atkinson, supra*. Szymanski was injured while performing a specific police assignment, i.e., an emergency run to assist another officer, an activity that carried an increased risk of injury; he was most certainly not "on break." Thus, Szymanski's reliance on *Atkinson* is without merit.

Szymanski further argues that the fireman's rule should not apply in this case because his injury stemmed from the negligence of an independent third-party, unconnected to the situation that required his presence at the scene. As noted above, the Michigan Supreme Court and this Court examined the applicability of the fireman's rule in such a context in *Gibbons* and in *Harris-Fields*, respectively. Under these cases, the limited exception to the fireman's rule, in a situation where an officer is injured by the negligent conduct of a third-party unconnected to the situation that brought the officer to the scene of his duties, applies only when the defendant's alleged wrongdoing results from "wanton, reckless, or grossly negligent" behavior. *Harris-Fields, supra* at 199.

Here, Szymanski was on an emergency run, having been dispatched to assist another scout car, at the time of the collision with Miller's vehicle. Miller's alleged conduct in causing the ensuing traffic accident was unconnected to the situation that brought Szymanski to the location where the accident occurred. Indeed, under footnote 4 in *Roberts, supra*, Miller's wrongdoing, even if it were to be determined to be wantonly, recklessly or grossly negligent, can certainly not be viewed as *subsequent* to or attenuated from Szymanski's exercise of his police function.

C. The Wanton, Reckless Or Grossly Negligent Behavior Exception.

Even, however, if our view of footnote 4 in *Roberts* is incorrect,[2] we need not reach the question of the applicability of the wanton, reckless or grossly negligent behavior exception to the fireman's rule. Szymanski's complaint alleged that Miller was guilty of "willful and wanton negligence and also gross negligence in the operation of the motor vehicle." However, the nature of Miller's conduct was not the focus of the motion for summary disposition, the trial court did not address this narrow issue in deciding the motion and the parties have not briefed the issue of Miller's conduct on appeal. Issues that are not raised before the trial court are generally not properly preserved for appellate review. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Further,

we are not required to search for authority to support a party's position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

In any event, the facts of this case do not support a finding of wanton, reckless or grossly negligent behavior on Miller's part. While Miller may have committed ordinary negligence in failing to notice and yield to Szymanski's oncoming scout car, there is no indication that Miller was aware of Szymanski's presence before the collision and thus deliberately disregarded a known risk to Szymanski. In this regard, Szymanski's mere allegation in his complaint of wanton misconduct and gross negligence, unsupported by allegations of fact to support such conclusions, do not suffice to state a cause of action. *Kramer v Dearborn Heights*, 197 Mich App 723, 725; 496 NW2d 301 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] Szymanski also argued that he would be "prejudiced" by the addition of the fireman's rule as an affirmative defense and that there had been "undue delay" in bringing the motion. However, Szymanski has not pursued these arguments on appeal.

[2] We note that on November 25, 1998, the Governor signed 1998 PA 389 which, among other things, permits firefighters and police officers to bring suit against private parties for on-the-job injuries caused by gross negligence, thereby limiting application of the fireman's rule to situations involving ordinary negligence. MCL 600.2965-600.2967; MSA _____. As noted in footnote 5 of *Roberts, supra* at 286-287, 1998 PA 389 essentially codifies Justice Boyle's concurring opinion in *Gibbons, supra*. 1998 PA 389 applies to causes of action arising on or after November 30, 1998, the effective date of the act, and does not apply to this case. However, it is worth noting the Legislature's codification of the wanton, reckless or grossly negligent behavior exception to the fireman's rule did not include the requirement, arguably present in *Roberts* that the behavior be subsequent to or attenuated from the exercise of the officer's function.